

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ROD MARQUARDT,

Plaintiff,

v.

STEPHEN KING and
SIMON & SCHUSTER, INC.,

Defendants.

Civil Action No.
1:10-CV-03946-JEC

**DEFENDANTS STEPHEN KING AND SIMON & SCHUSTER, INC.'S
MOTION FOR LEAVE TO FILE A RESPONSE TO
PLAINTIFF'S UNAUTHORIZED SURREPLY, IF NECESSARY**

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Defendants Stephen King (“King”) and Simon & Schuster, Inc. (“Simon & Schuster”) (collectively, “Defendants”), by and through undersigned counsel, respectfully submit this Motion for Leave to File a Response to Plaintiff’s Unauthorized Surreply. This motion is based on Plaintiff’s service upon Defendants of a surreply brief in further opposition to Defendants’ motion to dismiss on June 8, 2011, without leave of Court. In support of their motion, Defendants aver as follows:

1. On February 14, 2011, Defendants Stephen King and Simon & Schuster filed a Motion to Dismiss the Complaint (Dkt. 11) in the above-captioned proceedings under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. On March 11, 2011, counsel for Plaintiff sought an extension of time to respond to Defendants’ Motion to Dismiss through and including March 31, 2011, which motion was granted by the Court on March 14, 2011 (Dkt. 15).

3. On April 4, 2011, counsel for Plaintiff sought a further extension of time to respond to Defendants’ Motion to Dismiss of 10 days, which motion was granted by the Court on April 21, 2011.

4. Plaintiff filed his Response in Opposition to Defendants’ Motion to Dismiss on April 11, 2011 (Dkt. 20).

5. On April 15, 2011, the parties jointly sought an extension of time for Defendants to file a reply brief in light of ongoing discussions between the parties regarding this case, which motion was granted by the Court on April 21, 2011.

6. Defendants filed their reply brief in further support of their Motion to Dismiss on May 12, 2011 (Dkt. 23).

7. Almost a month later, on June 8, 2011, Plaintiff, now appearing *pro se*, served Defendants with a supplemental brief, dated June 6, 2011, in opposition to Defendants' Motion to Dismiss.

8. Plaintiff's 44-page surreply was filed without first seeking leave of court either as to the filing of the brief itself, *see, e.g., Fredrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005) ("Neither the Federal Rules of Civil Procedure nor this Court's Local Rules authorize the filing of surreplies."), or as to the filing of a brief in excess of the page limit provided under LR 7.1.D., N.D. Ga., which limits response briefs to 25 pages and reply briefs to 15 pages "absent prior permission of the court."

9. Further, even had Plaintiff sought leave, Plaintiff has not (and could not) demonstrate a valid reason to justify additional briefing. *See Fredrick*, 366 F. Supp. 2d at 1197 ("Though the Court may in its discretion permit the filing of a surreply, this discretion should be exercised in favor of allowing a surreply only

where a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief.”); *see also St. James Entertainment LLC v. Dash Crofts*, No. 09-CV-1975-RWS, 2010 WL 2802616 (N.D. Ga. July 13, 2010) (noting that courts are “disinclined to consider arguments raised in a surreply which could have been raised in an earlier filing”). Plaintiff was represented by counsel at the time his initial response brief was filed, and had ample opportunity to respond to the arguments raised in Defendants’ Motion to Dismiss. Defendants raised no new arguments on reply, and Plaintiff’s surreply does not identify any new arguments. Instead, the surreply is identified as a “response to defense’s motion to dismiss.” (Dkt. 24 at 6.)

10. Finally, Plaintiff’s supplemental brief is nothing more than an expanded version of the laundry list of supposed “similarities” that Defendants’ motion established were randomly selected incidental snippets of ideas and stock elements that are unprotected under copyright law. This expanded list does not change that conclusion.

11. Plaintiff’s surreply was filed without prior leave of Court, far exceeds the permissible page limit, and, in any event, does not respond to any new arguments in the reply. It should be excluded from consideration by the Court.

12. Nonetheless, if the Court grants Plaintiff leave *post hoc* to submit his surreply, Defendants hereby respectfully request leave of Court to file a brief not to exceed 15 pages in order to respond to Plaintiff's surreply brief.

WHEREFORE, Defendants respectfully request that this Court enter an Order striking Plaintiff's unauthorized surreply brief or, in the alternative, granting Defendants' motion for leave to respond to Plaintiff's surreply brief and directing Defendants to file their response within 10 days of the entry of such Order, and granting such other and further relief as this Court deems just and proper.

Respectfully submitted this 10th day of June, 2011.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

Pursuant to Local Rule 7.1(D), I hereby certify that this brief has been prepared in Times New Roman font, size 14, in accordance with Local Rule 5.1.

/s/ Christopher B. Freeman

Christopher B. Freeman

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing
DEFENDANTS STEPHEN KING AND SIMON & SCHUSTER, INC.'S
MOTION FOR LEAVE TO FILE A RESPONSE TO PLAINTIFF'S
UNAUTHORIZED SURREPLY by electronic notification through the Court's
CM/ECF system and by mail to the address set forth below:

Rod Marquardt, *pro se*
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This 10th day of June, 2011.

/s/ Christopher B. Freeman
Christopher B. Freeman